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November 18, 2004

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Docket No. R-1210

Dear Ms. Johnson:

Bank of America Corporation, a diversified financial holding company headquartered in Charlotte, North Carolina, ("Bank of America") is pleased to have this opportunity to comment on the proposed amendments ("Proposed Rule") to Regulation E ("Regulation") and the Official Staff Commentary ("Commentary") as published in the Federal Register by the Federal Reserve Board ("Board").

Bank of America is one of the world's largest financial institutions, serving individual consumers, small businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving 33 million consumer relationships with over 5,800 retail banking offices, 16,500 ATMs and award-winning online banking with more than eleven million active users. The company serves clients in 150 countries and has relationships with 96 percent of the U.S. Fortune 500 companies and 82 percent of the Global Fortune 500. Bank of America Corporation stock (ticker: BAC) is listed on the New York Stock Exchange.

Payroll Cards

The Proposed Rule would amend Regulation E to provide that payroll card products are included within the definition of "account" and so entitled to the protections provided by the Regulation. We strongly support this proposal. As noted in the supplementary information accompanying the Proposal ("Supplementary Information"), these products are assigned to an identifiable consumer and assume a recurring stream of deposits. Moreover, in many cases payroll cards are used by less sophisticated consumers for whom the product is the primary financial account. We see no legitimate reason why these consumers should not be entitled to the same level of protection as holders of traditional checking accounts. We also agree with the exceptions stated

in comment 2(b)-2 to Section 205.2 (b), which make clear that a payroll card product does not include cards intended for one time or sporadic deposits, such as for bonuses.

We recommend that the Board go further by providing guidance on a larger range of prepaid products. As with payroll cards, there remains uncertainty as to the proper treatment of other prepaid products. We are aware of other prepaid products marketed to consumers as an alternative to a traditional checking account. Although not specifically tied to payroll deposits, the funds often represent the primary financial asset of the cardholder. We believe that any prepaid product, whether explicitly tied to payroll or not, should be covered by Regulation E if it meets all of the following criteria:

a. Offered primarily for consumer purpose.
b. The issuer of the card should reasonably expect additions to the related account on a regular basis.
c. The card is part of an "open" system that permits use at a large number of unaffiliated merchants or through one or more ATM networks.
d. The cardholder has an unconditional right to the funds.

We do not believe that status of the related account as insured or not insured as a deposit by the Federal Deposit Insurance Commission should be relevant to the determination of coverage under the Regulation for these products.

If the Board adopts the above more expansive approach, it is important that the proposed Commentary also be expanded to clarify those prepaid products that should not be an "account" covered by the Regulation. As noted in the proposal, an "account" should not include any prepaid card intended for a one-time transfer of a salary-related payment. However, to provide clarity comment 2(b)-2 should include as part of the exception not just a one-time transfer of a salary-related payment, but also any one-time or sporadic transfers of value with respect to a card. This would include gift cards, or cards used for recurring bonuses where the cardholder has no reasonable expectation that the bonuses would continue, such as a prepaid card used for a quarterly bonus program. Unlike a prepaid card used for regular salary, the cardholder has no legitimate expectation that the funding will reoccur, and the funds will not represent the primary financial assets of the cardholder.

The Commentary should also make clear that the revisions to the Regulation are not meant to include other forms of benefit cards. This would include Health Savings Accounts, Health Flexible Spending Accounts, and Health Reimbursement Arrangements (established under Section 223, Sections 106 and 125, and Sections 105 and 106, respectively, of the Internal Revenue Code), and any other similar arrangement. These accounts may be funded in part by contributions from employers, and they may use a card as one method to access the available

funds. Nonetheless, in these cases the funds may be used for very limited purposes, and the cards represent a simplified method to access the funds in place of prior paper intensive reimbursement methods. These more limited purposes do not require treatment as an "account" under the Regulation, and we urge the Board to provide a specific comment to that effect.

If the Board is not willing to address prepaid products in a more general basis at this time, we believe at a minimum the proposal needs to be amended to avoid a potential gap in coverage. Proposed Section 205.2 (b) states that an "account" includes a payroll card product established "directly or indirectly" by the employer. However, in some cases prepaid card accounts are marketed by the issuer directly to consumers with the express purpose of being used for payroll. Once the prepaid card account is established, the employee requests his or her employer to make direct deposit of the payroll through the ACH or other electronic transfer system. Although not established "directly or directly" by the employer, we strongly believe the employee is still entitled to the same protection under the Regulation. For this reason, we recommend that the language in the Proposed Rule be revised to state:

> (b)(1) Account means ***
> (3) The term includes a "payroll card account" directly or indirectly established by an employer on behalf of a consumer to which electronic fund transfers of the consumer's wages, salary, or other employee compensation are made on a recurring basis, or any "prepaid card account" promoted by or on behalf of the card issuer for such purpose, whether the account is operated or managed by the employer, a third-party payroll processor, or a depository institution.

Electronic Check Conversion

The Proposed Rule would make a number of changes in both the Regulation and the Commentary in an attempt to address issues created by the growth in electronic check ("ECK") transactions. We support many of the specific proposals, for example the attempts to provide better and more uniform notices to consumers, but we believe in some cases the proposals will result in significant loss of control by and potential harm to consumers.

We support the proposed changes in the Regulation to Section 205.3 (a) and (b). The merchant or payee is the party electing to convert the check to an ECK transaction, and so is in the best position to make the appropriate disclosures to the consumer. In addition, we support the requirements that (i) the person who initiates the transaction should be responsible to obtain authorization from the consumer; and (ii) the notice should specify both that the ECK transaction may be cleared quickly, and that the consumer's financial institution will not return the check.

Unfortunately, some of the proposed changes in the Commentary would result in a significant loss of protections to consumers. For example, Section 205.3(b)(2)(i) states that the consumer

must authorize the ECK transaction. However, comment 3(b)(2)-1 states that the consumer authorizes a one-time ECK transaction when the consumer merely goes forward with a transaction after receipt of the required notices. It is possible this is sensible for a point-of sale transaction. In such a case, the consumer would be able to ask for an alternative payment method, and if not available, decline the entire transaction. This is not the case for transactions in which the conversion will take place by the merchant at the lockbox, for example with an ARC transaction through the ACH. For these transactions, the consumer is presented with a bill through the mail. In the overwhelming majority of cases, the consumer will have no dispute with respect to the bill and will recognize his or her obligation to pay. The mere fact that the consumer acts to comply with the obligation to pay, in the only manner presented, cannot reasonably be argued as meaningful authorization. This is clearly a unilateral change of terms by the merchant or payee. If an ECK transaction was intended as a requirement of payment, this should have been disclosed prior to the consumer becoming obligated on the underlying bill.

The issue is made worse by the provisions in comment 3(c)(1)-1 that would (along with the changes to Model Form A-6) permit the merchant or payee to include in the same notice a statement authorizing the collection of an additional charge in the case of insufficient funds.

This will have a substantial negative impact on financial institutions because they are often the first contact for complaints from consumers who expect their banks to only permit authorized withdrawals. These consumers are frustrated when they learn the conversion to an electronic transaction cannot be stopped by the financial institution, resulting in an overall loss in confidence in the safety and security of their deposits.

We believe it is more consistent with the intent of the Electronic Fund Transfer Act, as a consumer protection statute, that merchants and payees be required to obtain meaningful authorization. In the case of a point of sale transaction, as long as the consumer is provided the required notices prior to becoming obligated on the transaction, the decision to go forward may reasonably indicate consent. However, in the case of an ARC or similar transaction, where the consumer is presented with the notice after incurring the obligation to pay, ECK conversion should be treated as an option. For authorization to occur, the notice should provide the consumer with a clear and simple method for indicating he or she does not authorize the conversion. Finally, in all cases any imposition of an additional charge by the merchant or payee, for insufficient funds or otherwise, should require the separate authorization by the consumer.

Assuming the merchant or payee obtains meaningful authorization as described above, we believe the remaining new comments would be consistent with the intention of the parties and add useful clarity. For example, we believe it would not be reasonable for a payee to attempt to describe all the situations in which it may be preferable to convert the check into an ECK, so we agree with new comment 3(b)(2)-2. Further, if a payee returns the consumer's check at POS, the

additional disclosure under Section 3(b)(2)(iii) regarding return of the check would be unnecessary. Finally, as a practical matter the payee sends a bill to a single person. If authorization is obtained after proper notice, this should cover multiple checks returned with respect to a single bill.

Proposed comment 3(b)-3 states that that an electronic fund transfer from a consumer's account to pay an NSF fee is covered by the Regulation. We understand this comment to refer to the merchant that initiates an ECK transaction. However, the language chosen does not seem to limit itself to that circumstance. We recommend adding language to clarify exactly what this comment covers. In particular, the comment should state that it does not apply to any transaction excluded from coverage of the Regulation by section 205.3 (c)(5).

Electronic Check Conversion – Changes to Initial Disclosures

The Proposed Rule would amend the initial disclosure requirements. Institutions would need to include disclosures about ECK transactions in the sections dealing with the liability of the consumer, the contact information for the institution and the types of permitted transfers. The Proposed Rule also specifies that ECK transactions are a new type of electronic fund transfer. This means that institutions will need to send a change in terms notice to existing customers. The Supplementary Information requests comment on whether six months would be sufficient time to amend disclosures.

We think it is appropriate to include information about ECK transactions in the disclosures that deal with the liability of the consumer. We think it is unnecessary to include an ECK disclosure in the contact information for the institution. We do not understand why an ECK transaction would be considered a "type of transfer." Both the Electronic Fund Transfer Act and Regulation E require institutions to disclose the types of transfer that the consumer may make or initiate. Here the consumer intended to pay by check, not to initiate an electronic fund transfer. The merchant initiated the ECK. As a result, we believe ECK should not be listed as a type of transfer that the consumer may make or initiate.

If we need to make one or more changes to our disclosures, we will need to reprint our deposit agreement and ATM and debit card agreements and then distribute these agreements to our branches. We would need to destroy existing stocks of these agreements. After we have begun to use new disclosures in the branches, we would send a notice to existing customers. This will require a significant amount of time to accomplish. Six months is not sufficient time. We recommend a minimum of 12 months. Since the consumer would receive a notice from the merchant at the time the merchant initiates an ECK, we believe a longer implementation period would not be harmful to consumers.

Replacement of Existing Debit Cards With Multiple Cards as Renewals or Substitutes

Currently, the Regulation allows financial institutions to issue access devices on a solicited or unsolicited basis. For unsolicited issuance, the financial institution must meet certain requirements including sending only non-validated devices accompanied by the initial disclosures required under section 205.7. The devices could then be validated only after the financial institution has verified the consumer's identity. For solicited issuances, the Commentary provides that the financial institution can send devices that substitute for existing devices with a one-for-one rule that states "in issuing a renewal or substitute access device, financial institution my not provide additional devices."

The Proposed Rule would clarify that financial institutions my issue more than one access device during the renewal or substitution of a previously accepted access device, provided that they comply with the conditions set forth for issuing unsolicited devices, including the requirement to send the initial disclosures.

We agree that the validation requirement avoids or limits monetary losses from the theft of access devices sent through the mail. However, accompanying the devices with all of the initial disclosures can complicate the mailing. Since all of these customers have already received the initial disclosures, we suggest that the Board modify the Proposed Rule to state that the financial institution can disclose (if true) that the additional device can be used under the terms previously disclosed. This would be similar to the required disclosures for supplemental credit devices under Regulation Z. 226.9(b).

If the Board decides to maintain the validation requirements in the Proposed Rule, we request that the Board clarify that a single validation may be used to activate multiple access devices sent to a consumer as renewals or substitutes for a single access device. The activation on one card would serve to activate all the cards.

Written Authorization for Preauthorized Transfers from Consumer's Account

Under current Regulation E, preauthorized electronic fund transfers from a consumer's account may be authorized only be a writing signed or similarly authenticated by the consumer. A financial institution does not obtain proper authorization by tape-recording a telephone conversation.

In light of the Electronic Signatures in Global and National Commerce Act, the Board would delete language from the Commentary to clarify that telephone conversations may comply the

Regulation E requirement if such conversations are properly found to meet the E-Sign requirements. We support this clarification.

The Proposed Rule would also clarify what constitutes reasonable procedures to avoid error in determining in a telephone conversation or online whether a card to be used for recurring payments is a credit card or debit card. The requirements for obtaining authorization are different. A comment would be added to state that such procedures would vary with the circumstances. For example, asking the consumer to specify whether the card is a credit card or debit card, using those terms, is a reasonable procedure. We support this clarification and believe that the financial institution should not have to verify whether the consumer correctly identified the card to the merchant.

Error Resolution

The Proposed Rule makes several changes regarding the obligations of a financial institution to investigate an alleged error. The first is proposed comment 11(b)-7, which clarifies that if the consumer fails to provide timely notice of the alleged error, the financial institution need not comply with the various procedural requirements in Section 205.11. Nonetheless, the consumer is not liable for the unauthorized transfer except under Section 205.6. We believe this is a helpful comment and properly reconciles the provisions of these two sections. A consumer who delays reporting the alleged error should not receive the benefit of the very strict requirements in Section 205.11, for example the need to resolve the claim or provide provisional credit within 10 business days. However, the financial institution should not be able to totally shift all risk to the consumer, and should have a good faith obligation to investigate in a reasonable period of time and determine liability consistent with Section 205.6.

The second change involves an increase in the required scope of the investigation when the alleged error concerns certain types of electronic fund transfers – such as ones that occur under the federal recurring payments programs or that are cleared through an ACH or similar arrangement. We believe the Board is correct that the ACH has been used increasingly for a wide variety of third party transfers, and that these new types of transfers have resulted in an increase in the number of alleged errors involving the ACH. We expect the number of such alleged errors will continue to grow, causing increasing frustrations to consumers and costs to financial institutions.

Proposed comment 11(c)-5 would modify the “four-walls” rule by requiring the financial institution to review all relevant information within its own records, and may not in all cases limit its investigation to review of the payment instructions. The Supplementary Information suggests this could include such information as the location of the payee, the particular number of the check (to determine if notably out of order), or prior transactions with the same payee.

The proposed remedy will not address the justified frustrations of consumers, but it will add additional costs and risks for financial institutions. For the vast majority of alleged errors involving ACH transactions, the consumer reports the alleged error soon enough for the financial institution to request and receive a signed affidavit and charge back the transaction pursuant to the NACHA rules. In these cases, the consumer is made whole. A problem only occurs if the consumer reports the alleged error within the time period permitted under Section 205.11, but too late for a charge back under the tighter NACHA deadlines. As with all ACH disputes, the number of alleged errors filed by consumers in this "gap" period continues to grow. We currently receive more than 1,000 such claims each month.

For alleged errors filed in this "gap" period, the new comment will still not result in a satisfactory resolution. In many cases the information available to the financial institution will not provide meaningful assistance in determining whether or not the transaction was in fact authorized. In such cases the financial institution will reasonably rely upon the representation from the originating financial institution that the transaction was properly authorized, and so deny the claim. Because the review will not include any direct evidence of authorization, the consumer will justifiably be frustrated and focus blame on his or her financial institution for "failing to protect" the deposit account from unauthorized transactions.

The financial institution will have limited options to help its customer. First, it could demand a copy of the authorization and assert its claim for indemnification under the NACHA rules. This is a manual process, and so very expensive. Second, the financial institution could take the loss itself. Given the nature of the ACH, neither of these responses with their related costs is fair to the financial institution. In the case of other electronic fund transfer networks, financial institutions make a choice between a number of competing networks when deciding with which to participate. For example, a financial institution may elect to issue Visa® or MasterCard® branded check cards. In making this decision, the financial institution will consider the operating rules and assess its costs and risks, including potential losses from reimbursements for unauthorized transactions that cannot be charged back under the network rules. This is not the case for ACH transactions. As a practical matter, financial institutions have no option but to participate. Furthermore, once a participant a financial institution must accept all ACH transaction types. In fact, the non-voluntary nature of this participation is expressly recognized in the Regulation and Commentary and provides much of the justification for the "four-walls" rule.

We believe the Board should withdraw this proposed comment and instead use its influence to achieve a modification in the NACHA rules. These should be amended to permit charge backs for a period at least as long as the period for reporting alleged errors under Section 205.11. This would avoid the current source of frustration to consumers and place the burden for assuring transactions are properly authorized on the originating merchant and financial institution, the two parties best positioned to monitor and police this requirement. This approach of automatic right

to charge back already works well for most ACH disputes, and would not impose significant additional costs on merchants or its financial institution.

Disclosures at Automated Teller Machines

The Proposed Rule would amend the Commentary to clarify the current Regulation E requirements for notices posted on an automated teller machine ("ATM"). More specifically, comment 16(b)(1)-1 would be amended to clarify that if there are circumstances in which an ATM fee will not be imposed, ATM operators may disclose in the notice posted on or at the ATM that a fee "may" be imposed. We strongly support the proposed clarification.

The pricing practices of many large ATM operators have become increasingly complex. ATM operators now frequently do not impose fees for some types of transactions or for some cardholders. Although the current Commentary permits posting a list of the specific transactions subject to a fee, this would be confusing to customers and expensive to ATM operators because of frequent changes. If the only alternative is to post a notice that a fee "will" be imposed for providing electronic fund services, then ATM operators are forced to provide a statement that is arguably misleading. The proposal to permit a statement that fees "may" be imposed is fully consistent with section 904(d)(3)(A) and (B) of the Electronic Fund Transfer Act, which provides that an ATM operator, who charges a consumer for electronic fund transfer services, must provide notice to the consumer indicating "that a fee is imposed" for the service in a prominent and conspicuous location on or at the ATM. When coupled with the additional requirement with an ATM on-screen disclosure accompanied by the fee amount, this provides clear notice and protection to consumers.

Further, we urge the Board to make clear in the supplemental information accompanying the final rule that the proposed revisions merely clarify the current ATM fee disclosure requirements. The failure to make such a clarification could lead to the revisions being viewed as only prospective in nature.

Bank of America appreciates the opportunity to comment on the Proposed Rule. Please contact us if you have any questions on the above.

Sincerely,

Daniel G. Weiss
Associate General Counsel

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